STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2007
v	No. 271105 Calhoun Circuit Court
DEARKA DEWAUN SWIFT, Defendant-Appellant.	LC No. 2006-000205-FH

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of driving under the influence of a controlled substance causing death, MCL 257.625(4), and manslaughter, MCL 750.321. Pursuant to MCL 769.10, he was sentenced as a second habitual offender to 142 to 270 months in prison for each conviction. We affirm.

I

Defendant first argues that the police violated his right to present a defense when they destroyed or lost the vehicle involved in the fatal collision before defense experts could examine it. Thus, defendant contends that his convictions must be reversed.

Whether defendant was denied the right to present a defense is a constitutional question that we review de novo. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *People v Kurr*, 253 Mich App 317, 320; 654 NW2d 651 (2002).

A defendant is constitutionally entitled to have access to evidence, and the state's failure to disclose exculpatory evidence to a defendant violates due process. *Arizona v Youngblood*, 488 US 51, 55, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988). However, when the state fails to preserve potentially exculpatory evidence, due process is violated only if the police act in bad faith. *Id.* at 58. "Absent the intentional suppression of the evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Stated another way, if the defense has requested the evidence, the careless destruction of the evidence does not require reversal unless the defendant can show that the police acted in bad faith. *People v Amison*, 70 Mich App 70, 79; 245 NW2d 405 (1976). Finally, even when the destruction is intentional, as

long as the purpose is not to destroy evidence before the trial, reversal is not required. *People v Hardaway*, 67 Mich App 82, 87; 240 NW2d 276 (1976).

Although the police intentionally failed to preserve the vehicle in this case, defendant has not presented evidence to suggest that the police intended to deprive him of exculpatory evidence before trial or that they acted in bad faith. Defense counsel received notice that he had 10 days to inspect the vehicle in March or April of 2005. It was not until August 2005 that the vehicle was released. Although it may have been appropriate to provide an additional warning to defendant before police authorized the vehicle's release, the presumption on the part of the police that defendant had already inspected the vehicle in the four months that had passed since the first notice was not unrealistic or evidence of bad faith. The trial court did not err by finding a lack of bad faith or by declining to suppress the evidence gathered from the vehicle. *Amison*, *supra* at 79.

II

Defendant also argues that the failure to preserve the vehicle violated the statutory requirements of Michigan's warrant act, MCL 780.651 *et seq*. We note at the outset that defendant has provided no citation of authority beyond the statute itself. Nevertheless, we will address the merits of defendant's argument in this regard.

The interpretation of a statute presents a question of law that we review de novo. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999). The goal of statutory interpretation is to discern the intent of the legislature from the plain language of the statute. *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). Where the plain language of the statute is unambiguous, the presumption is that the Legislature intended that plain meaning, and judicial construction is not permitted. *Morey*, *supra* at 330.

MCL 780.655(2) states in part that "[t]he property and things that were seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence in any trial."[1] In *In re Forfeiture of $25,505*, 220 Mich App 572, 575-577; 560 NW2d 341 (1996), we concluded that the police violated the prior MCL 780.655 when they not only failed to count the cash they seized from the claimant's basement, but also failed to preserve the cash itself and deposited it into a bank account. Once the cash was deposited, the claimant could not prove through fingerprinting or tests for drug residue that some of the cash was his and did not constitute the proceeds of his son's drug trafficking. *Id.* at 577. We concluded that the police had failed to preserve the evidence until it was no longer needed, and had therefore violated the statute. *Id.* at 579-580.

In another case, we similarly concluded that the plain language of the statute, providing that the evidence "shall be safely kept," requires that the police preserve the seized evidence until it is no longer necessary for trial. *People v Jagotka*, 232 Mich App 346, 351-355; 591 NW2d

[1] MCL 680.655 was revised by 2002 PA 112. However, the 2002 amendment did not substantively change this language.

303 (1998) (*Jagotka I*), rev'd in part 461 Mich 274 (1999).[2] In *Jagotka I*, we held that because the defense had not been able to independently analyze a blood sample before police disposed of it in the course of routine practice, without bad faith, the statute was violated because the sample was still necessary for trial. *Id*. at 356.

However, our Supreme Court reversed, holding that because a blood sample, itself, is not necessary to be produced or used as evidence at trial, the statute was not implicated. *People v Jagotka*, 461 Mich 274, 279; 622 NW2d 57 (1999) (*Jogotka II*). Instead, the *Jagotka II* Court determined that only the reports or test results from the blood sample evidence were necessary for trial. *Id*. The Court specifically noted, "we do not suggest that other types of seized items, which might be introduced at trial, could be rendered 'unnecessary' by the mere generation of a 'report.'" *Id.* at 280. It also noted, "we do not conclude that the police may destroy a blood sample 'as soon as the police generate . . . their test report.' We hold only [that the statute] does not mandate safekeeping of blood samples . . . ." *Id.* at 281 n 7.

We conclude that the blood sample seized in *Jagotka II* and analyzed to determine the defendant's blood alcohol level is similar to the motor vehicle involved in the fatal collision in this case. Like the testing of a blood sample, a vehicle inspection would naturally result in specific findings or the generation of a report. And like the blood sample in *Jagotka II*, the vehicle, itself, would not have been produced at trial. Instead, like the laboratory report introduced at trial in *Jagotka II*, the findings and testimony of the expert who actually inspected the vehicle was produced at trial in this case. We conclude that the police did not violate the statutory requirements of MCL 780.655 by releasing the vehicle before trial in this case.

We also note that even if the police strictly violated the statute, it is apparent from the record that any error in this regard was not outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Because defendant's allegation of a statutory violation by the police is a claim of preserved non-constitutional error, it is defendant's burden to establish that the alleged error more probably than not resulted in a miscarriage of justice. *Id*. Defendant had several months to conduct an independent inspection of the vehicle, and remained perfectly free to cross-examine or impeach the prosecution's automotive expert at trial. Moreover, it is highly questionable whether any evidence gathered from the automobile could have been helpful to defendant's case. Defendant has failed to show that the alleged statutory violation more probably than not resulted in a miscarriage of justice. *Id*.

III

Defendant also argues that the trial court abused its discretion when it precluded the admission of evidence that the victim had been involved in four previous traffic accidents. Defendant contends that this evidence should have been admitted as evidence of habit or routine.

[2] Although that decision is not binding on this Court because the Supreme Court's reversal on other grounds completely disposed of the case, it is persuasive authority. *Dunn v DAIIE*, 254 Mich App 256, 266; 657 NW2d 153 (2002).

A trial court's decision whether to admit evidence will be reversed only when there is a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494, 577 NW2d 673 (1998).

Evidence of a habit or routine is admissible to show that the person acted in conformity therewith on the occasion in question. MRE 406; *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 256; 318 NW2d 639 (1982). MRE 406 states that the evidence "whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Routine practice or habit requires more than just one occurrence of the behavior. *Cook v Rontal*, 109 Mich App 220, 224-225; 311 NW2d 333 (1981). The evidence must show that the act has "been performed on countless occasions" or is a "set practice." *Id.*; *Laszko*, *supra* at 256. Evidence that the victim had been involved in four accidents was simply insufficient to show a set pattern, routine, or conduct performed on countless occasions. The trial court did not abuse its discretion by ruling that the evidence was not admissible as evidence of routine or habit under MRE 406. *Starr*, *supra* at 494.

IV

Defendant also argues that evidence of the victim's "proclivity for involvement in collisions" should have been admitted under *People v Harris*, 458 Mich 310, 315-318; 583 NW2d 680 (1998). In *Harris*, our Supreme Court ruled that evidence of the violent character of a victim may be admissible when self-defense is claimed because the character of the victim is at issue. We decline to consider this issue because defendant failed to raise it in his statement of the questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, we note that the victim's character was not "an essential element of a claim, charge, or defense" in this case. *Harris*, *supra* at 318. Reversal is not required on this basis.

V

Lastly, defendant argues that there was insufficient evidence to support his convictions of manslaughter and driving under the influence of a controlled substance causing death.

When considering a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational jury could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); see also *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The jury's verdict is given deference, particularly on matters of credibility and conflicting testimony. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To convict a defendant of driving under the influence of a controlled substance causing death, MCL 257.625(4), the prosecution must prove "beyond a reasonable doubt that (1) the defendant was operating his or her motor vehicle in violation of MCL 257.625(1), (3), or (8); (2) the defendant voluntarily decided to drive, knowing that he or she had consumed a controlled substance and might be intoxicated; and (3) the defendant's operation of the motor vehicle

caused the victim's death." *People v Schaefer*, 473 Mich 418, 434; 703 NW2d 774 (2005), clarified by *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).

Defendant does not dispute that he was driving the automobile at issue or that the victim died from injuries suffered in the accident. Moreover, it cannot be disputed that marijuana and THC, its active ingredient, are controlled substances. See MCL 333.7212(1)(d). Expert testimony showed that defendant's level of THC was too high to have been the result of second-hand smoke, and that defendant likely consumed the marijuana within 12 hours of the accident. This was sufficient evidence from which a jury could have found beyond a reasonable doubt that defendant knowingly consumed marijuana before the accident. A reasonable jury could have also concluded from this evidence that defendant voluntarily decided to drive knowing that he might be impaired. Thus, the only remaining element at issue is causation. To prove causation, there must be evidence that defendant caused the death simply by his driving; whether his driving was "impaired" is irrelevant. *Derror*, *supra* at 333-334.

To convict a defendant of manslaughter with a motor vehicle, the prosecution must prove beyond a reasonable doubt that the defendant operated a vehicle in a grossly negligent manner and substantially caused the death of another. *People v Lardie*, 452 Mich 231, 248 n 28; 551 NW2d 656 (1996), overruled in part on other grounds *Schaefer*, *supra* at 422. To establish gross negligence, the prosecutor must prove that the defendant (1) knew the situation required the exercise of ordinary care and diligence to avert injury to another, (2) had the ability to avoid the harm by exercising ordinary care and diligence, and (3) failed to exercise the care and diligence necessary "to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997) (citation omitted). Stated differently, a defendant is grossly negligent when he "realizes the risk of his behavior and consciously decides to create that risk . . . . [T]he actor does not seek to cause harm, but is simply 'reckless or wantonly indifferent to the results.'" *Id.* at 502 (citations omitted).

With respect to the manslaughter charge, defendant correctly argues that violating the speed limit alone is not evidence of gross negligence. *Id.* at 504. However, sufficient evidence was presented at trial to show that defendant was not merely speeding, but that he was "flying," traveling at least 30 miles per hour in excess of the posted speed limit. Further, as noted above, there was evidence that defendant had knowingly consumed marijuana before the accident. Finally, the accident took place in a residential area where several side streets intersect with the main throughway on which the collision occurred. Defendant told police that he knew the area well because he had driven the stretch of road hundreds of times. Based on all the evidence presented, we conclude that a rational jury could have found beyond a reasonable doubt that defendant drove his automobile in a grossly negligent manner causing death. Thus, like the driving under the influence charge discussed above, the only element remaining at issue is causation.

For the purposes of both manslaughter and driving under the influence of a controlled substance causing death, the defendant's driving must be the factual cause of death. *Schaefer*, *supra* at 435-436; *People v Rideout*, 272 Mich App 602, 604; 727 NW2d 630 (2006), rev'd in part on other grounds, 477 Mich 1062 (2007); *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). A defendant's act is the factual cause of the accident and the death if "absent the defendant's conduct" the accident would not have occurred. *Schaefer*, *supra* at 435-

436. In other words, "[i]f the result would not have occurred absent the defendant's conduct, then factual causation exists." *Rideout, supra* at 604. Defendant states that the victim's act of "pulling out into the intersection when he had an obligation to wait at the stop sign until traffic had cleared" was the factual cause of the accident. However, but for defendant's driving, the accident would not have occurred. This is sufficient to establish factual causation with respect to the charge of driving under the influence of a controlled substance causing death. *Schaefer, supra* at 445. It is also sufficient to establish factual causation with respect to the charge of manslaughter with a motor vehicle. *People v Tims*, 449 Mich 83, 95; 534 NW2d 675 (1995).

A closer question is whether defendant's driving was the proximate cause of the victim's death. With respect to both manslaughter and driving under the influence of a controlled substance causing death, a defendant's driving must also be the proximate cause of death. *Schaefer, supra* at 436; *Rideout, supra* at 604; *Stewart, supra* at 41. In the present case, we conclude that a reasonable jury could have found that the fatal accident was the direct and natural result of defendant's excessive speed and marijuana consumption. Indeed, if defendant had not been speeding or impaired by drugs, he likely would have driven with ordinary care and would have had time to react to avoid the accident.

In making a proximate cause determination, it is necessary to examine whether there was an intervening, superseding cause breaking the causal chain between defendant's conduct and the victim's injury. *Schaefer, supra* at 436-437. Defendant argues that the victim's act of pulling out in front of him was an intervening cause that broke the causal link. However, an act breaks the causal link and becomes a superseding cause only if the "act by the victim or third party was not reasonably foreseeable—e.g., gross negligence or intentional misconduct . . . ." *Schaefer, supra* at 437. A simple negligent act is foreseeable and is not a superseding cause. *Id.* "The linchpin in the superseding cause analysis . . . is whether the intervening cause was foreseeable based on an objective standard of reasonableness." *Id.*

We conclude that the victim's driving into the intersection may have been negligent, but it was not grossly negligent and was foreseeable based on an objective standard of reasonableness. Drivers pull out in front of other cars regularly. A reasonable driver is aware that a sudden stop to avoid an accident may be required, and adjusts his or her speed accordingly. Although defendant had the right of way, he did not have the right to be driving 30 miles per hour or more in excess of the posted speed limit after having consumed marijuana. It appears that the victim pulled out directly in front of defendant; however, the victim may well have believed that defendant was traveling at the posted speed limit and that there was accordingly sufficient time to do so safely. Indeed, testimony suggested that when a car is approaching another, it is often difficult to judge its speed. While the victim apparently misjudged defendant's speed, his pulling out into the intersection was not grossly negligent and was reasonably foreseeable. Under the circumstances, a reasonable jury could have concluded that defendant's driving was both the factual and proximate cause of the accident, and that the victim's act was not a superseding, intervening cause. See *Tims, supra* at 95 (it is generally for the jury to decide whether the defendant's conduct was the proximate or legal cause of death). Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found that the prosecution proved beyond a reasonable doubt all essential elements of manslaughter and driving under the influence of a controlled substance causing death. *Hunter, supra* at 6.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey

I concur in result only.

/s/ E. Thomas Fitzgerald